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May 21, 1997

Mr. William F. Caton
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1919 M Street, N.W.
Room 222
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In re: WB Docket No. 97-115

Dear Mr. Caton:

Transmitted herewith, on behalf of MobileMedia Corporation, et al., are an original and fourteen copies of a "Motion to Delete Issue 14(b)" filed in connection with WT Docket No. 97-115. Pursuant to the Commission's Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture in this proceeding, this motion is required to be certified by the Presiding Officer to the Commission for resolution.

In the event there are any questions concerning this matter, please contact the undersigned.

Very truly yours,



Arthur B. Goodkind

cc (w/enc.): The Honorable Joseph Chachkin

All persons listed on Certificate of Service

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MAY 21 1997

Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
MOBILEMEDIA CORPORATION, et al.) WT Docket No. 97-115
)
Applicant for Authorizations)
and Licensee of Certain)
Stations in Various Services)

To: The Honorable Joseph Chachkin

MOTION TO DELETE ISSUE 14(b)

MOBILEMEDIA CORPORATION, et. al.

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May 21, 1997

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In the Matter of)
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147 C.F.R. § 1.229 (1996). The issue in paragraph 14(b) would require that the Company's outside counsel present testimony concerning their role in preparing and filing a key report in this proceeding. The Company has therefore engaged undersigned special counsel to deal with these matters. Undersigned counsel were engaged on May 9, 1997 and are filing this motion as soon as possible thereafter. The due date for this motion under Section 1.229 of the Rules is May 27, 1997.

14(b) of the Hearing Designation Order² in the above-referenced proceeding.³

As we show in this Motion and in the attached Declarations of counsel, inclusion of the issue was based on readily demonstrable mistakes of fact and on a misunderstanding of two sentences included in one of a series of massive disclosure filings by the Company. Unless corrected, these mistakes and misunderstandings will have very serious consequences. They result in a hearing issue that wrongly calls into question the integrity of the very MobileMedia personnel, and particularly

²Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing for Forfeiture, FCC 97-124 (released April 8, 1997) ("HDO"). Notwithstanding the procedures outlined in Section 1.229 of the Commission's rules, the HDO specifies that any motions to delete be certified by the Presiding Officer to the Commission for resolution. Consequently, the Company hereby requests that this motion be promptly certified in accordance with the HDO. Moreover, given that testimony is due to begin in this case on June 10, MobileMedia respectfully requests that this motion be given expedited consideration.

³Now pending before the Commission is an appeal of the Presiding Judge's denial of an "Emergency Motion for Special Relief and Stay of Proceedings Regarding MobileMedia Corporation" which had sought a stay of the hearing so that the Company could avail itself of the process afforded by the Commission's decision in Second Thursday Corp., 22 F.C.C. 2d 515 (1970). The motion had been supported by the Wireless Telecommunications Bureau, as is the currently pending appeal.

counsel, who have voluntarily and completely disclosed extremely serious wrongdoing to the Commission and who fully cooperated with the Commission's staff during many months of investigation.⁴

SUMMARY

I

The hearing issue designated in paragraph 14(b) of the HDO is based wholly on mistakes of fact and a misunderstanding of the Company's October 15, 1996 Counsel's Report to the Commissions.⁵ That Counsel's Report had voluntarily provided the Commission with detailed information concerning a very large number of false application filings by the Company. The HDO's errors with respect to the Counsel's Report are as follows:

⁴The scope of the issue and its application to the actions of the Company's counsel has been affirmed by the Commission in its May 5, 1997 order denying the "Motion for Clarification or Modification of Issue" filed by the Wireless Telecommunication Bureau. Order, FCC 97-152. Neither the Company nor its counsel participated in the Bureau's Motion or had been aware in advance of the Bureau's decision to file it until immediately prior to the filing.

⁵Factual Report Regarding Regulatory Compliance Issues, filed with the Wireless Telecommunications Bureau on October 15, 1996 (herein, "Counsel's Report").

(1) Paragraph 3 of the HDO states that the Counsel's Report did not disclose that an "employee," who was described in the report as having been aware of the illegal practices and who had questioned the propriety of the false filings with the Company's then Chief Operating Officer, was himself a corporate officer. This HDO finding is clearly based on an assumption that the employee referred to in the portion of the Counsel's Report cited in HDO paragraph 3 was Mark Witsaman, the Company's Senior Vice-President/Chief Technology Officer. In fact, as shown conclusively in this motion, the reference in question was not to Mr. Witsaman but to a different employee, who was not an officer. This HDO non-disclosure finding was thus based on a clear mistake of fact.

(2) HDO paragraphs 3 and 10 state or imply that the October 15 Counsel's Report failed to disclose Mr. Witsaman's identity as a corporate officer and that Mr. Witsaman had knowledge of the false application filings at the time they occurred. Both conclusions are mistaken, because the October 15 Counsel's Report did explicitly and repeatedly report each of these matters. Not only did the Report explicitly include Mr. Witsaman's name and corporate position, but his knowledge of the false application

filing was shown in four separate documents included in the report as Appendices. The HDO's contrary assertion is thus based on a less than complete reading of the Report. Moreover, Mr. Witsaman's knowledge and, indeed, his continued employment by the Company were the subjects of repeated subsequent discussions between counsel for the Company and Bureau staff and were dealt with explicitly in two further written submissions to the Bureau.

(3) Based on Mr. Witsaman's position as an officer and knowledge that wrongdoing had occurred, the HDO states that the Counsel's report misrepresented facts or lacked candor in stating that "none of the members of senior management involved in the derelictions -- either directly or as a matter of responsibility -- remain employed by the Company" and that "other lower-level employees [were not] disciplined simply for their awareness of the practice." But what the HDO discloses in its characterization of these statements is a misunderstanding of the meaning assigned to the terms in question. While the precise language used could arguably have been more clear, in the context of the facts about Mr. Witsaman that were included in the Counsel's Report, and particularly in the context of the five-month self-investigation and continuing series of oral and

written submissions to the Wireless Bureau by the Company's counsel, it is both unreasonable and manifestly unfair to characterize the portions of the two sentences quoted above as an attempt to mislead the Commission.

Most simply put, the sentences in question were written at a time when the perpetrator of the wrongdoing and the three persons above him in the corporate hierarchy who were aware or who had been reported to be aware of the false filings were gone from the Company. A decision had been reached that other employees who had only known about the false filings should not be terminated. The two sentences in question might have conveyed this information with greater precision and clarity, but any such unintended lack of clarity or inartful drafting are far from deliberate misrepresentation or lack of candor.

II

It is particularly clear on the facts of this case that there was no intent to mislead. Having discovered extremely serious wrongdoing in its application filings, the Company and its attorneys concluded from the outset that the only conceivable

course of action from that point on would be to conduct a complete investigation and to report to the Commission fully and with absolute candor what had happened, who had been responsible for it, and what remedial steps had been and would be taken to insure that similar events could never occur again. This purpose is again confirmed in the attached Declarations of Richard E. Wiley, Robert L. Pettit and Eric L. Bernthal, counsel for the Company. It is at best bizarre to suggest that the experienced and highly reputable attorneys who conducted the investigation for the Company and who prepared the October 15 Report would have undercut the entire purpose of the Company's extensive voluntary disclosure effort by seeking to mislead the Commission on a subsidiary issue involving a single employee. There was absolutely no motive for anyone to do so and there is no evidence whatsoever that either counsel or the Company had any such intent.

The Paragraph 14(b) issue should accordingly be deleted as having lacked factual basis at the time it was designated.

I. BACKGROUND: THE COMPANY'S INVESTIGATION AND REPORTS TO THE COMMISSION

On September 4, 1996, counsel for MobileMedia met with Michele C. Farquhar, then Chief of the Commission's Wireless Telecommunications Bureau, for the purpose of informing the Bureau that the Company had become aware of significant wrongdoing in the filing of the Company's Forms 489.⁶ Counsel stated that the Company had retained him to investigate the wrongdoing and pledged that the wrongdoing would be fully reported to the Commission and further pledged the Company's complete cooperation with the Commission in establishing responsibility for the wrongdoing. This disclosure by the Company's counsel was made voluntarily at the Company's initiative.

No complaint concerning the improper filing practices had been made to the Commission and no Commission investigation had been commenced. On September 26, 1996, counsel again met with the Chief of the Bureau and members of her staff to describe the essential facts of the investigation known on that date,

⁶See Attached Declaration of Eric L. Bernthal.

including the approximate number of inaccurate Form 489 filings, to report the Company's intent to terminate two employees (Messrs. McVay and Belardi, who were directly responsible for the wrongdoing), and to report that the Company had uncovered additional issues to investigate. Over the course of the next several months, the Company made numerous oral and written submissions to the Commission's staff, submitted many hundreds of pages of documents, made its employees and directors available to the Commission staff, made numerous searches of its files, and routinely waived attorney-client privileges and statutes of limitations -- all for the purpose of giving the Commission the complete and unvarnished facts regarding the admitted wrongdoing.

One of these actions was the submission of the October 15, 1996 Counsel's Report prepared by MobileMedia's counsel, Latham & Watkins and Wiley, Rein & Fielding. The report was the first written summary of the scope and causes of the wrongdoing and the first of a series of written submissions to the Commission. The Counsel's Report, which was well over 150 pages long, consisted of a 28-page narrative summary of counsel's findings and conclusions, 18 exhibits and an appendix cataloging the fraudulently filed applications known to counsel as of the date

of the report.⁷ In a cover letter to the report, the Company's counsel stated:

We will be making our further submissions to you shortly. In the interim, we respectfully request that you advise us of any further questions or issues which are suggested to you by the Report or from our prior discussions. As you know, we are eager to provide you with a complete factual record as quickly as possible.⁸

In numerous subsequent conversations with Bureau staff and consistently in its written communications with the Bureau, counsel for the Company stressed the Company's wish to supply any and all information that the Bureau might deem relevant to the investigation and actively solicited inquiries from the Bureau as to any questions its staff might have about any aspect of the investigation. See, e.g., attached Declarations of Eric L. Bernthal, Robert L. Pettit and Richard E. Wiley. In response to

⁷As recited in the narrative, the investigation that resulted in the report "was conducted by counsel over a seven-week period beginning on August 20, 1996" by a total of "nine attorneys from Latham & Watkins and Wiley, Rein & Fielding." As part of the investigation, "[o]ver twenty interviews were conducted and thousands of documents were reviewed" in three Company offices.

⁸Letter from Eric L. Bernthal to Michelle Farquhar, October 15, 1996, at 1-2.

Commission staff requests and on its own initiative, the Company undertook additional lines of investigation and submitted numerous additional reports and documents⁹ and, to the best of our knowledge, responded affirmatively to every Bureau request for information.

The Company and its counsel believed and continue to believe that the investigation and report had been an exemplary effort. At no point during counsel's extensive discussions with the Commission's staff was any contrary suggestion made. See attached Pettit Declaration. At no point did anyone on the staff

⁹Among many other submissions, these included:

- an October 31, 1996 Memorandum of Law, prepared by outside counsel, which had been requested by the Bureau staff;
- a November 8, 1996 report, prepared by outside counsel and voluntarily submitted by the Company, regarding MobileMedia's nationwide licenses;
- a September 18, 1996 internal report to the Company's Board, prepared by outside counsel, voluntarily submitted by the Company as part of a November 20, 1996 document submission requested by the Bureau staff; and
- a January 31, 1997 letter prepared by outside counsel in response to several specific questions raised by the Bureau staff.

call into question the accuracy of the October 15 Counsel's Report. While designation for hearing on the underlying conduct issues had always been seen as one of the Commission's options given the extent of the underlying misconduct, designation of a misrepresentation/candor issue with respect to the investigation report itself came as a total surprise and shock.

II. THERE IS NO FACTUAL BASIS FOR THE CONCLUSIONS UNDERLYING PARAGRAPH 14(b) .

Under consistent Commission precedent, a motion to delete¹⁰ will be granted when designation of the issue appears to have been based on "a misunderstanding of the representations made by" the licensee.¹¹ Likewise, issues are properly deleted when

¹⁰Motions to delete are specifically authorized by the Commission's Rules, which indicate that such motions "shall contain specific allegations of fact sufficient to support the action requested" and that the allegations "shall be supported by affidavits of a person or persons having personal knowledge thereof." 47 C.F.R. § 1.229(d) .

¹¹Southern Broadcasting Co., 40 F.C.C. 2d 1109, 1113 (1973) (misrepresentation issue deleted because Review Board had misconstrued the import of statements made in materials submitted by licensee). See also Newsweek Radio Stations, Florida, Inc., 33 R.R. 2d (P&F) 891, 893 (1975) (citations omitted) (deletion of issues proper where the Commission "misconstrued pertinent

(continued...)

information presented after the designation order is adopted establishes that there is no substantial question of fact requiring a hearing on the issue.¹² Both tests are met in this case.

A. THE COUNSEL'S REPORT IDENTIFIED MR. WITSAMAN AND REPEATEDLY DISCLOSED HIS KNOWLEDGE OF THE WRONGDOING.

The HDO is simply incorrect in stating that the October 15 Counsel's Report failed to disclose the role of Mr. Witsaman or his knowledge of the wrongdoing.

At the outset, we may dispose quickly of the HDO's allegation that the Counsel's Report failed to disclose that an "employee" mentioned in the report as having been aware of the Company's ongoing illegal practices and as having questioned the propriety of the false filings with the Company's then Chief Operating Officer was "a corporate officer of MobileMedia." The apparent assumption underlying this finding in paragraph 3 is

(...continued)
information before it at the time of designation").

¹²See WOIC, Inc., 44 F.C.C. 2D 891, 892 (1974) (issue deleted in face of affidavits from applicant satisfactorily explaining the matter in question).

that the "employee" referred to at this portion of the Counsel's Report was Mr. Witsaman, since Mr. Witsaman is a former BellSouth employee and the employee in question was identified as a former BellSouth employee.

In fact, the portion of the Counsel's Report forming the basis for the HDO finding described above did not refer to Mr. Witsaman, but to Todd Wheeler, a MobileMedia employee who was not a corporate officer. While the erroneous conclusion in the HDO is understandable -- both Mr. Witsaman and Mr. Wheeler were former BellSouth employees and Mr. Wheeler was not identified by name in the portion of the Counsel's Report quoted in paragraph 3 of the HDO -- the attached Declaration of Wiley, Rein & Fielding attorney, Christopher D. Cerf, and the attached October 8, 1996 memorandum of his September 30, 1996 interview with Mr. Wheeler show conclusively that the employee referred to in the portion of the report cited in HDO paragraph 3 was Mr. Wheeler, not Mr. Witsaman. The HDO's finding of a failure to disclose was in this respect thus based on a mistake of fact.

It is also clear that the Counsel's Report did identify Mr. Witsaman and his position in the Company, and fully disclosed his

knowledge of the false application filings. While no one was identified by name in the report's narrative section, the exhibits attached to the report included detailed information about the named individuals who had been directly responsible for the wrongdoing and about additional persons who had knowledge of it. Among the persons identified as having had knowledge of the wrongdoing was Mark Witsaman.

Exhibit 2 to the Counsel's Report clearly identifies Mr. Witsaman by name, identifies him as MobileMedia's "Senior Vice President/Chief Technology Officer," and reports that he was interviewed in the investigation. The same part of the report also contains an organizational chart which again identifies Mr. Witsaman and his position inside the Company. The Counsel's Report also clearly discloses that Mr. Witsaman had knowledge of the wrongdoing.¹³ Exhibit 12 of the report includes a February 27, 1996 memo of a meeting at which the filing of false 489 forms had been discussed. That memo shows explicitly on its face that it was prepared by Mr. Witsaman and is also identified as having

¹³Indeed, the report reveals that Mr. Witsaman was one of MobileMedia employees who had knowledge of the wrongdoing -- all of whom were interviewed by investigating counsel.

been prepared by Mr. Witsaman in a covering handwritten note written by the Company's former Regulatory Counsel, also included in Exhibit 12.

At least three other documents submitted as part of the Counsel's Report identify Mr. Witsaman as someone who knew of the wrongdoing. These documents include (1) a memorandum from Mr. McVay to Messrs. Bernthal and Goldman in which, for example, Mr. McVay refers to a December 1995 or January 1996 conversation with Mr. Witsaman regarding the wrongdoing.¹⁴ (2) a memorandum dated August 22, 1996 from Mr. McVay to Mr. Bayer which refers to a

subsequent conversation several months later with Witsaman regarding Gene (Mark [Witsaman] and I spoke several times concerning Gene's frustration with the lack of communication between the corporate network group and Gene): "BellSouth lawyer would never take risks that Gene would take" (unfortunately, I did not understand Mark to mean this incident or anything of this magnitude) [.]¹⁵

¹⁴Counsel's Report, Exhibit 8, McVay "FCC 489 Outline" dated August 27, 1996, at ¶1(b)(i)(1).

¹⁵Counsel's Report, Exhibit 8, McVay Memorandum to David Bayer dated August 22, 1996, at ¶4(c).

and (3) a February 8, 1996 memorandum from Mr. Belardi to Mr. Witsaman in which Mr. Belardi asks for Mr. Witsaman's help in identifying outstanding construction permits that "we should cover with the filing of a Form 489" and says that the Company "should file as many Forms 489 as possible and as quickly as possible."¹⁶ Additionally, as noted above, Exhibit 12 also contains an August 30, 1996 note from Mr. Belardi to investigating counsel in which Mr. Belardi explains that the document is "Mark's memo which lists all the action items that were identified as a result of my briefing . . . Item 9 reflects the 489 filing project. . . ."¹⁷

The HDO's "non-disclosure" allegations with respect to Mr. Witsaman are particularly inappropriate in light of the fact that the October 15 Counsel's Report was not submitted in a vacuum but rather as part of a lengthy and continuing process of disclosure and dialogue with the Wireless Telecommunications Bureau. On November 20, 1996, for example, the Company submitted to the Bureau Latham & Watkins' "Preliminary Report to the Company's

¹⁶Id. at Exhibit 9.

¹⁷Id. at Exhibit 12.

Board of Directors" dated September 18, 1996, waiving the privileged nature of the report. That report included a full paragraph devoted to the role and possible culpability of the Chief Technology Officer, who had previously been identified as Mr. Witsaman.¹⁸

Indeed, information furnished by the Company led to further inquiries from the staff about Mr. Witsaman, and the Company cooperated in making him available for a deposition by the Bureau. As reflected in the attached Bernthal Declaration,

¹⁸Attachment A to letter dated November 20, 1996 to Gary P. Schonman, Esq. from Latham & Watkins and Wiley, Rein & Fielding, at pp. 23-24. The relevant portion of the Report stated:

4. Role of Chief Technology Officer

Finally, the Chief Technology Officer can be criticized for failing to speak out against the proposal given familiarity with FCC Form 489. In fairness, however, this fact is greatly mitigated by his newness to the Company. Moreover, the Chief Technology Officer was confronted with a proposal advanced by Regulatory Counsel, tacitly endorsed by the General Counsel, and approved by Senior Management. Given this context, his acquiescence is somewhat understandable. The Chief Technology Officer may also be criticized for failing to quantify and budget for the commitment represented by the filings. This inattentiveness allowed the issue to lay dormant for a number of months and kept other members of senior management from appreciating its significance. Again, however, it appears that the Chief Technology Officer took his lead from other members of senior management."

MobileMedia's counsel orally disclosed the Company's personnel deliberations regarding Mr. Witsaman to the Bureau staff; counsel explained the reasoning behind the decision to keep him in the Company's employ; and counsel specifically invited the Bureau to reflect upon the Company's decision and advise the Company if the Bureau felt differently. These communications were made directly by counsel to the Bureau and in a further detailed written presentation made January 31, 1997 that set forth the factors leading to the Company's decision not to terminate Mr. Witsaman's employment even though he had been aware of the false Form 489 filings.¹⁹ In the context of this total and continuing process of communication between the Bureau and counsel for the Company, no intent to conceal Mr. Witsaman's role can reasonably be inferred. See Intercontinental Radio, 56 RR 2d 903, 926 (Rev. Bd. 1984).

¹⁹January 31, 1997 letter to Michelle C. Farquhar and William E. Kennard from Robert L. Pettit and Eric L. Bernthal, et al., at 7-8.

B. THE SOLE PURPOSE OF THE COUNSEL'S REPORT WAS TO PROVIDE COMPLETE AND FULLY CANDID DISCLOSURE TO THE COMMISSION. THERE IS NO BASIS FOR SUGGESTING THAT ITS INTENT WAS TO MISLEAD.

As shown above, Mark Witsaman's position at MobileMedia and his knowledge of the false Form 489 filings were fully disclosed in the Counsel's Report and were subsequently the subject of discussions with and submissions to Bureau staff. What remains is the wording of the October 15 Counsel's Report as it related to Mr. Witsaman.²⁰

The HDO focuses on two statements in the Counsel's Report: (1) that the Company had "terminated the employment of responsible senior management personnel" and that "none of the members of senior management involved in the derelictions -- either directly or as a matter of responsibility -- remain

²⁰The wording of the October 15 Counsel's Report is unrelated to the substantive question of whether Mr. Witsaman's employment should have been continued by MobileMedia. The reasoning that led to the Company's decision to retain Mr. Witsaman was described in the January 31 submission and was discussed with Bureau staff. The Commission may agree or disagree with the Company's decision as to where it should have "made the cut" in deciding which staff members to terminate -- a matter about which the Bureau's views were invited prior to issuance of the HDO -- but this is not an issue that involves any question of candor or non-disclosure.

employed by the Company" and (2) that "other lower-level employees should not be disciplined simply for their awareness of [the false filings]."

This October 15 Counsel's Report was prepared by counsel. At the time the report was prepared, the facts were as follows:

(1) the person in the Company who had conceived of the plan to prepare the false reports and had prepared, signed and filed them had been terminated, (2) the person to whom the preparer of the false reports reported, the Company's General Counsel, had also been terminated and (3) the two senior corporate officers to whom the General Counsel reported, the former Chief Operating Officer and former Chief Executive Officer, both of whom were reported by others to have had knowledge of the filing of the false reports at the time they were being filed and who had apparently condoned the filings, had left the Company before the derelictions were discovered. Additionally, others in the Company (below the level of the Chief Operating Officer and Chief Executive Officer) who had known of the filing of the false reports but who had not participated in the filings and who had no supervisory responsibility over anyone directly responsible for the false filings, had not been terminated.

As stated in the Declarations of Eric L. Bernthal and Robert L. Pettit, no one involved in preparing the report had any intent to convey any information other than the facts set forth above in the Counsel's Report. As stated in each of the Declarations, there was no intent on the part of anyone involved in preparing the report to conceal any facts with respect to Mr. Witsaman.

Could the facts in the two sentences in question have been more clearly stated in the report? Certainly that is arguable. The fact that the reference to "lower-level" employees who had only known of the false filings was intended to include everyone below the CEO/COO level might have been more clearly stated and a less generic term than "as a matter of responsibility" might have been used to say exactly what is set forth in the immediately preceding paragraph of this motion. But it is a far leap from questioning whether particular language was "lacking in clarity or could have been more artfully drawn"²¹ to an unwarranted conclusion that the language represented an attempt to deceive the Commission.

²¹Southern Broadcasting Co., supra, at 1112.